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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

APR 29 2003

File: WAC 02 064 56087

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in California in March 1993. It is engaged in the wholesale and retail of Indian made garments. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage. The director further determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On appeal, counsel for the petitioner asserts that the Bureau overlooked evidence previously submitted by the petitioner, gave undue weight to the staffing of the petitioner, incorrectly analyzed the managerial or executive capacity of the beneficiary's position, and improperly rejected the beneficiary's employment in the capacity of a functional manager. Counsel also asserts that the Bureau overlooked evidence of the petitioner's ability to pay the beneficiary the proffered wage and that the petitioner will submit additional evidence to establish a qualifying relationship with the beneficiary's overseas employer.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will be employed in an executive or managerial capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary would negotiate contracts, set up lines of credit, establish company policies and goals, as well as network with other manufacturers and sellers of Indian garments. In addition, the beneficiary would have sole control over pricing decisions, shipping goals and would directly supervise the purchasing/office manager and the store manager.

The petitioner also provided its Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short Form Income Tax Return for the year 2000. The IRS Form 1120-A revealed salaries paid in the amount of \$1,080 for the year 2000.

The director requested further evidence of the beneficiary's managerial or executive duties. The director specifically requested a more detailed description of the beneficiary's duties, a list of all employees under the beneficiary's direction, and the percentage of time the beneficiary spent on each of her duties. The director also requested copies of the petitioner's California Form DE-6, Quarterly Wage Report for the years 2000 and 2001.

In response, the petitioner, through its counsel, indicated that the beneficiary devoted 20 percent of her time to personnel decisions, including retaining independent contractors. The petitioner indicated that the beneficiary spent 20 percent of her time managing essential functions through the supervision of her store manager, the company accountant, and the marketing representative. The petitioner also indicated that the beneficiary spent 20 percent of her time networking with existing

¹ The director has set out the pertinent portions of the petitioner's description of the beneficiary's job description verbatim. The descriptions are not repeated here.

business clients to monitor customer satisfaction, expand sales, and evaluate the popularity of the product, as well as networking with other manufacturers and wholesalers to establish new business relationships. The petitioner also indicated that the beneficiary spent 20 percent of her time coordinating business arrangements between the United States entity and the overseas entity. The petitioner indicated that the beneficiary spent the remaining 20 percent of her time devoted to supervising employees, managing inventory, coordinating manufacturing schedules, product availability, and product design with the demand from the United States market.²

The petitioner also provided its organizational chart depicting the beneficiary as president, a store manager, and two sales personnel. The chart also showed three independent contractors holding positions identified as marketing/sales representative, accountant, and tailor. The petitioner's California Form DE-6 for the quarter in which the petition was filed, confirmed the full-time employment of the store manager and the part-time employment of the two sales personnel. The California Form DE-6 also reflected the part-time employment of the individual identified as the marketing/sales representative, although the petitioner had indicated this individual was hired as an independent contractor.

The director determined that the evidence submitted, including the petitioner's job descriptions of the beneficiary's responsibilities, the organizational chart, and the California Form DE-6 did not establish that the beneficiary was or would be employed in a position that was primarily managerial or executive in scope. The director determined that it was unreasonable to believe that the beneficiary would not be assisting with day-to-day non-supervisory duties. The director further determined that the beneficiary was a first-line supervisor of non-professional employees. The director also determined that the petitioner had not shown that the beneficiary managed or directed the management of a function rather than performing the operational activities of the function.

On appeal, counsel for the petitioner asserts that the beneficiary functions in an executive capacity and that the petitioner's staffing level meets the reasonable needs of the company without requiring the beneficiary to engage in non-qualifying duties. Counsel asserts that the store manager is responsible for supervising the two part-time sales personnel and is responsible for managing the petitioner's day-to-day office operations. Counsel cites unpublished decisions to support the assertion that the number of staff is not a valid basis of denial where it is shown that the beneficiary is the top executive or

² As the director set out the verbatim description of the beneficiary's job description, the descriptions are not repeated here.

manager of the organization. Counsel also contends the beneficiary holds a managerial position with the petitioner. Counsel asserts that the beneficiary directly supervises the store manager who in turn supervises other personnel within the organization. Counsel further contends that the beneficiary manages an essential function of the petitioner and cites unpublished decisions in support of this contention.

Counsel's assertions are not persuasive. Counsel asserts that the petitioner has ample staff to relieve the beneficiary from performing non-qualifying tasks. However, it is not clear from the record that the beneficiary's assignment within the organization is comprised primarily of executive duties. It is not clear who prepares the budgets, purchases the products, performs the day-to-day banking tasks, and performs the inventory checks, and checks for product availability. The store manager appears to have the primary duty of handling the day-to-day operations of the petitioner's retail store and even performing the sales function when the part-time sale help is not available. It is not clear how often the petitioner uses the services of the marketing/sales representative and how this individual contributes to tasks other than some type of marketing and sales. The petitioner has provided no independent evidence of the use of the services of an accountant and it is not clear how much time this individual contributes to the accounting needs of the petitioner. Upon review of the totality of the record, it is not possible to conclude that the beneficiary's assignment within the organization is primarily executive in scope rather than primarily providing operational services to the petitioner. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The record is insufficient to support counsel's assertion that the petitioner has ample staff to relieve the beneficiary from performing tasks that are more than incidental to the continuing operation of the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's citation to unpublished decisions is not persuasive. Unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c). Moreover, the facts of the cited cases are not sufficiently analogous to the case at hand and the deficiencies of this record.

Counsel's assertion that the beneficiary supervises a store manager, who, in turn, supervises part-time sales help, and thus, the beneficiary qualifies as a "manager" is not persuasive. As noted by counsel, the store manager is sometimes involved in the routine sales duties of the petitioner. Neither counsel nor the petitioner delineates the amount of time the store manager

participates in the routine operational tasks of the petitioner rather than "managing" the part-time sales personnel. As noted above, the petitioner has not provided independent evidence of the employment and supervision of the accountant depicted on the petitioner's organizational chart. In addition, it is not clear how much time the beneficiary devotes to "supervising the accountant." The information regarding the marketing/sales representative is unclear. It appears this individual is employed on a part-time basis, although the petitioner identified the individual as an independent contractor. The petitioner has not provided sufficient evidence to establish that the beneficiary supervises employees who are primarily employed in managerial, professional, supervisory positions.

There is insufficient evidence in the record to determine that the beneficiary is managing essential functions of the petitioner rather than performing the operational tasks associated with the functions. Upon review of the record, it does not appear that the beneficiary is primarily selling the petitioner's product. However, the record does not support a conclusion that the beneficiary is managing the remaining necessary functions of the petitioner rather than performing the functions. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*. The petitioner has not submitted sufficient independent evidence to overcome the director's decision on this issue. As noted above, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c).

Counsel's assertion that the petitioner's number of staff is not a valid basis for a denial, if the beneficiary is identified as the top executive or manager of the organization, is not persuasive in this case. The director may consider the size, nature, and staffing level of the petitioner in making his decision; although if doing so, the director must also consider the reasonable needs of the organization. See section 101(a)(44)(C) of the Act. To determine the reasonable needs of a petitioner, the Bureau must have sufficient information regarding the tasks of the petitioner's employees or independent contractors, independent evidence of the individuals actually compensated by the petitioner for performing necessary tasks, consistent evidence demonstrating the roles of the employees or independent contractors, and an understanding of the nature of the petitioner's business. In the case at hand, the petitioner provided brief job descriptions for the store manager and the part-time sales personnel. The petitioner also provided job descriptions for the accountant, tailor, and marketing/sales representative. As noted above, however, the petitioner did not provide independent and consistent evidence of the employment of independent contractors. The job descriptions provided for the verifiable staff on hand at the time the petition was filed are not sufficient to allow a conclusion that these individuals could fulfill the reasonable needs of the petitioner, and thus, relieve

the beneficiary from primarily performing non-qualifying tasks. The lack of information on this issue, coupled with the general job description provided for the beneficiary does not allow a contrary conclusion. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The second issue in this proceeding is whether the petitioner established a qualifying relationship with the overseas entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

On appeal, counsel for the petitioner submits eight invoices issued to the prior owner(s) of the petitioner totaling \$15,298. Counsel asserts that the forgiveness of this debt is the amount of consideration offered for the purchase of the petitioner.

Counsel also submits a letter from the petitioner's accountant explaining that certain responses on the petitioner's Internal Revenue Service (IRS) Form 1120-A, U.S. Corporation Short-Form Income Tax Return, were made in error. The accountant explains that the new owner of the petitioner is Krishna Imports and Exports, a sole proprietorship owned by the beneficiary and her husband. The accountant explains that his responses to the questions should have reflected this ownership on the tax return. The petitioner, however, has not provided evidence that this information has been conveyed to the IRS in the form of amended returns. The record contains insufficient evidence to overcome the director's decision on this issue.

The third issue in this proceeding is whether the petitioner has established its ability to pay the beneficiary the proffered wage of \$20,800 per year, i.e. \$400 per week. On appeal counsel acknowledges that the director relies on the petitioner's IRS Form 1120-A to determine the petitioner's ability to pay the proffered wage. The IRS Form 1120-A shows the petitioner's net income for that year to be a net loss of \$3,362. Counsel contends, however, that the petitioner has sufficient assets available to pay the beneficiary's wage and that the petitioner has not failed in its obligations in the past.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to

pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Given the net loss of \$3,362, the petitioner appears unable to pay the proffered wage of \$20,800 per year. Therefore, the petitioner has not submitted sufficient independent documentation to overcome the director's determination on this issue.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.